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BEFORE THE ARIZONA CORPORATION COMMISSION

AZ CORP COMMISSION
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Arizona Corporation Commission

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MARC SPITZER

Chairman

JAMES M. IRVIN

Commissioner

WILLIAM A. MUNDELL

Commissioner

JEFF HATCH-MILLER

Commissioner

MIKE GLEASON

Commissioner

UTILITIES DIVISION STAFF,

Complainants,

vs.

LIVEWIRENET OF ARIZONA, LLC,

Respondents,

THE PHONE COMPANY MANAGEMENT
GROUP, LLC,

Respondents,

THE PHONE COMPANY OF ARIZONA JOINT
VENTURE d/b/a THE PHONE COMPANY OF
ARIZONA,

Respondents,

ON SYSTEMS TECHNOLOGY, LLC, and its
Principles, TIM WETHERALD, FRANK
TRICAMO and DAVID STAFFORD
JOHNSON

Respondents,

THE PHONE COMPANY OF ARIZONA, LLP,
and its members,

Respondents.

DOCKET NO. T-03889A-02-0796

T-04125A-02-0796

MOTION TO DISMISS DAVID
STAFFORD JOHNSON

1 COMES NOW, David Stafford Johnson ("Johnson"), and pursuant to A.R.S. 12(b)(6)
2 and 56, respectfully moves to dismiss David Stafford Johnson as a Respondent from this action
3 as follows:

4 1. The Staff of the Utilities Division of the Arizona Corporation Commission
5 ("Staff") brought its Complaint ("Complaint") against The Phone Company Management
6 Group, LLC, f/k/a LiveWireNet of Arizona, LLC ("PCMG"), On Systems Technology, LLC
7 ("On Systems"), and its principals, Tim Wetherald, Frank Tricamo, and David Stafford
8 Johnson, on October 21, 2002. The Staff specifically named Johnson as an individual
9 respondent.

10 2. In its Complaint, the Staff questioned the adequacy of PCMG's service to its
11 customers, its compliance with applicable laws, and financial viability, and asserts four claims
12 for relief. *See* Complaint, ¶¶ 8-45.

13 3. None of these allegations or claims directly implicates Johnson in any way.
14 Instead, the Staff merely identifies Johnson as a member of On Systems. *Id.* ¶ 7, 12.

15 5. Arizona Rule of Civil Procedure 12(b)(6) provides that a party may assert by
16 motion the defense of failure to state a claim upon which relief can be granted. Further, "if
17 matters outside the pleading are presented to and not excluded by the court [on a 12(b)(6)
18 motion], the motion shall be treated as one for summary judgment and disposed of as provide
19 in Rule 56." *E.g., Donlann v. MacGurn*, 55 P.3d 74, 76 n. 1 (Ariz. App. 2002) (stating that a
20 motion to dismiss that references outside materials is to be treated as a motion for summary
21 judgment).

22 6. Arizona Rule of Civil Procedure 56 provides: "A party against whom a claim,
23 counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time,
24 move with or without supporting affidavits for a summary judgment in the party's favor as to all
25 or any part thereof." *E.g., Joel Erik Thompson, Ltd. v. Holder*, 965 P.2d 82, 85 n. 3 (Ariz. App.
26 1998) (noting that if a trial court considers affidavits in support of a motion to dismiss, the
court's ruling is treated as a one of summary judgment).

1 7. In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the
2 court must assume that truth of the allegations contained in the complaint. *See B.J. Logan v.*
3 *Forever Living Products International, Inc.*, 52 P.3d 760 (Ariz. 2002); *see also Parks v.*
4 *Macro-Dynamics, Inc.*, 591 P.2d 1005, 1007 (Ariz. App. 1979) ("A Rule 12(b)(6) motion to
5 dismiss for failure to state a claim, which assumes the complaint's allegations are true, attacks
6 the legal sufficiency of the complaint") (citations omitted).

7 8. Here, the allegations in the Complaint, even if taken as true, are not sufficient to
8 support any claim against Johnson because the Staff has failed to allege that he participated in
9 or was aware of any of the events that form the basis of its Complaint. Likewise, the Staff has
10 failed to assert claims upon which Johnson could otherwise be held personally responsible
11 under the Commission's rules. Indeed, Johnson has never been a member of PCMG. *Id.* at ¶1.

12 9. Although Johnson was a member of On Systems, his role in this entity was
13 extremely limited. Thus, Johnson never participated in the day-to-day operations or
14 management of On Systems, a Colorado limited liability company. *See* Affidavit of David
15 Stafford Johnson, attached hereto as Exhibit A. Instead, Johnson was merely a member who
16 invested in this limited liability company. *Id.* at ¶ 2-3.

17 10. Although Johnson was briefly a manager of LiveWireNet of Arizona, LLC
18 ("LiveWireNet of Arizona"), his role in this entity was also very limited, and he never was a
19 member of LiveWireNet of Arizona *Id.* at ¶¶4-5. Moreover, Johnson's limited activity in this
20 Arizona limited liability company took place before On Systems acquired LiveWireNet of
21 Arizona on January 29, 2002. Significantly, Johnson resigned his position with LiveWireNet
22 of Arizona upon the sale of LiveWireNet of Arizona to On Systems.

23 11. Given that Johnson has neither participated in nor is aware of the events that
24 give rise to this action (*Id.* at ¶6), and the fact that the Staff has failed to allege facts that
25 support any claim against him in this proceeding, the Staff's Complaint is insufficient as to
26 Johnson.

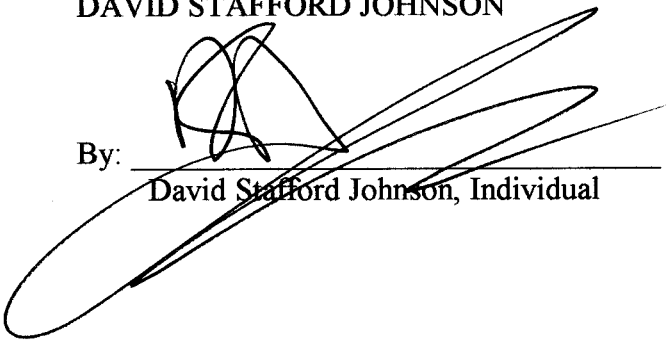
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WHEREFORE, pursuant to A.R.S 12(b)(6) and 56, Mr. Johnson respectfully requests
that he be dismissed from this action.

DATED this 7th day of May 2003.

Respectfully submitted,

DAVID STAFFORD JOHNSON

By: 
David Stafford Johnson, Individual

1 **ORIGINAL and 13 copies of the foregoing**
2 **sent via U.S. Mail, postage prepaid, this**
3 **7th day of May, 2003 to:**

4 Docket Control
5 ARIZONA CORPORATION COMMISSION
6 1200 West Washington Street
7 Phoenix, AZ 85007

8 **COPY of the foregoing sent via U.S. mail,**
9 **postage prepaid, this ____ day of May, 2003:**

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BEFORE THE ARIZONA CORPORATION COMMISSION

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**AFFIDAVIT OF DAVID
STAFFORD JOHNSON**

1 The Affiant, David Stafford Johnson, being first duly sworn, deposes and states that he
2 is over twenty-one years of age and if called upon to testify, he is competent to testify as to the
3 matters stated as follows:

4 1. I have never been a member of The Phone Company Management Group, LLC,
5 an Arizona limited liability company. I have never visited this limited liability company's
6 offices in Arizona. I have never maintained an office at this limited liability company. I have
7 never been involved in the management or day-to-day operations of this limited liability
8 company. Since the name change from LiveWireNet of Arizona, LLC to The Phone Company
9 Management Group, LLC in late January, 2002, I have never been a manager of the company
and at all times never held myself out to the public as a manager of this company.

10 2. Although I was a member of On Systems Technology, LLC, a Colorado limited
11 liability company, from January 1, 2002 through August 7, 2002, I never participated in the
12 day-to-day operations or management of this Colorado limited liability company. I have never
13 been a manager of the company and never held myself out to the public as a manager of this
14 company.

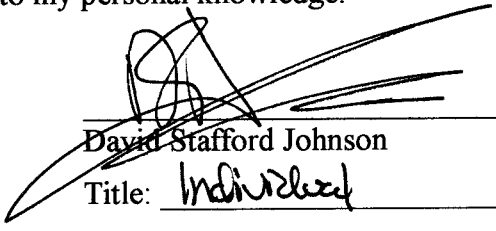
15 3. My membership with On Systems Technology, LLC, was solely based on my
16 investment in this company.

17 4. Although I was a representative of LiveWireNet of Arizona, LLC beginning
18 when it was formed as a subsidiary to Live Wire Networks, Inc.; I resigned my position when
19 On Systems Technology purchased LiveWireNet on January 29, 2002. I have never been a
member of LiveWireNet of Arizona, LLC.

20 5. My association with LiveWireNet of Arizona, LLC, was based on my financial
21 investment in its parent, Live Wire Networks, Inc.. LiveWireNet of Arizona, LLC did not ever
22 commence offering telecommunications services in Arizona.

23 6. I did not participate in, and I do not otherwise have knowledge regarding the
24 facts or claims alleged by Staff in the above-captioned action.

1 The foregoing statements are true and correct to my personal knowledge.

2
3 
4 David Stafford Johnson

5 Title: Individual

6 STATE OF Colorado)
7) ss.
8 COUNTY OF Frapahoe)

9 SUBSCRIBED AND SWORN to before me this 17th day of May 2003.

10 My commission expires: My Commission Expires
11 3/5/2006

12 (SEAL)

13 
14 Notary Public
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